

November 17, 2004

Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

Re: Docket No. R-1210–Proposed Rule: Regulation E - Electronic Fund Transfers

Dear Ms. Johnson:

We appreciate the opportunity to submit these comments on behalf of Branch Banking and Trust Company and its affiliated banks and subsidiaries of BB&T Corporation (BB&T) concerning the proposed rule (“Proposed Rule”) issued by the Board of Governors of the Federal Reserve System (“FRB”) on September 17, 2004. The Proposed Rule revises certain provisions of Regulation E, implementing the Electronic Funds Transfer Act (“EFTA”).

The Proposed Rule would revise Regulation E, and the FRB’s official staff commentary on Regulation E (“Commentary”) to address, among other things, payroll cards and electronic check conversion services (ECK). In addition, the Proposed Rule includes revisions and clarifications to the Commentary relating to: stop payment and revocation of authorizations for preauthorized electronic fund transfers (“EFTs”); replacement of existing debit cards with multiple renewal or substitute cards; telephonic authorizations for preauthorized EFTs; requirements for automated teller machine (“ATM”) notices; error resolution procedures; and notices of transfers varying in amount.

BB&T is a financial holding company headquartered in Winston-Salem, North Carolina. Ranked as the nation’s eleventh largest financial holding company with more than \$97 billion in assets, BB&T operates more than 1,400 financial centers in the Carolinas, Virginia, Maryland, West Virginia, Kentucky, Tennessee, Georgia, Florida, Alabama, Indiana and Washington, D.C. To better serve its customers, BB&T is involved in many of the electronic payment products and services emerging in the market, and has structured products and services that BB&T believes meets consumer needs at a reasonable cost with various protections against theft and fraud.

Thus, BB&T is generally supportive of the FRB’s efforts to clarify the regulatory framework that may be applicable to certain of these emerging electronic payment products and services, specifically payroll cards and ECK. In fact, we believe that the Proposed Rule will eliminate some areas of confusion and provide additional flexibility to banks, merchants, employers and consumers.

However, we have concerns about some of the specific proposals relating to payroll cards and ECK, because we believe that, if implemented without change, the proposals will discourage future developments in these areas. BB&T's position on specific provisions of the Proposed Rule and revised Commentary are summarized below.

I. Payroll Cards.

A. Regulation E should apply to payroll cards only to the limited extent that it applies to electronic fund transfers of government benefits.

As the Proposed Rule recites, the EFTA and Regulation E provide the basic framework setting forth the rights, liabilities and responsibilities of participants in electronic funds transfers from or to a consumer account. As the FRB is aware, the requirements of the EFTA were designed with traditional deposit accounts in mind at a time when electronic access to consumer deposit accounts was largely confined to automated clearing house credits and debits and limited ATM transactions. The FRB has amended Regulation E over time to accommodate developments in the electronic funds transfer area, including in 1994 to cover electronic benefit transfer programs established by the Federal Government, and in 2001 to accommodate the provisions of the Electronic Signatures in Global and National Commerce Act ("E-Sign Act").

Since the enactment of the EFTA, one of the more significant developments in the area of electronic payments has been the growth in electronic payment cards. The FRB in 1996 issued a proposed rule that could have covered what at the time was called "stored value" products, but given the infancy of the market at the time, the FRB wisely never implemented that or any other proposal in that area. Prepaid cards and other electronic payment cards have become more popular in the last year or so, and financial institutions, such as BB&T, have responded to that need. One of these new products is the payroll card.

BB&T agrees with the FRB that payroll cards allow employers to more economically pay employees who lack checking accounts. In fact, the cards are a safer way for employees to receive their wages instead of a paper check or cash. Because the funds underlying the cards constitute employee wages, BB&T agrees that, from a public policy perspective, the funds should have some of the protections against unauthorized transfers, error resolution procedures, initial disclosures and other consumer protections provided by Regulation E. However, BB&T does not agree with the FRB's conclusion that such cards are substitutes for, or the equivalent of, traditional deposits or checking accounts.

Unlike traditional deposit accounts, payroll cards typically do not provide consumers with the ability to load or deposit additional funds onto the card or limit the means to do so. Thus, the consumer cannot load cash received from individuals or from other sources. Similarly, the means of accessing the funds

underlying the card is typically limited to use of the card at an ATM or at the point of sale; and consumers cannot write checks or withdraw or transfer funds directly from an account. As a result, payroll cards provide more limited services to the cardholder than are available to the holder of a traditional deposit account. If anything, these cards represent a hybrid product that may facilitate the transition of a cardholder to a deposit account holder over time. Therefore, the very basis for the FRB's proposal to apply full Regulation E coverage to payroll cards is not consistent with industry practices with respect to payroll cards.

Thus, while we agree that protecting the wages of employees is important, we believe that any application of Regulation E needs to take into account that payroll cards are primarily electronic payment products, not traditional accounts, and that some of the requirements of Regulation E (such as a periodic statement) designed for traditional deposit accounts may not be appropriate for, or desired by, the holders of payroll cards. In this respect, payroll cards are more analogous to the cards issued or sponsored by the government to distribute electronic benefit transfers. Accordingly, like the government electronic benefit transfer programs, we believe that full, unmodified, Regulation E coverage would not be appropriate for, and would not be consistent with the unique attributes of, payroll cards. Rather, BB&T believes that the FRB should apply Regulation E's provisions to payroll cards only to the same limited extent that they apply to the electronic funds transfer of government benefits, as set forth in 12 C.F.R. 205.15. This means providing an alternative to the periodic statement and modified requirements to the initial disclosures, annual error resolution notices, and the trigger for the time periods for reporting unauthorized transfers and error resolution procedures.

B. Definition of payroll card account is overly broad.

The FRB proposes to include payroll cards as an "account" covered by Regulation E and the EFTA by amending the definition of account in 12 C.F.R. 205.2(b) to include payroll card accounts by adding a new subsection (3). This subsection (3) states that the term account "includes a 'payroll card account' directly or indirectly established by an employer on behalf of a consumer to which electronic fund transfers for the consumer's wages, salary, or other employee compensation are made on a recurring basis, whether the account is operated or managed by the employer, a third party payroll processor, or a depository institution."

We believe that the proposed definition, is overly broad and does not accurately reflect the nature of the accounts as they are evolving in the industry. For example, payroll accounts generally are not established by employers "on behalf of consumers." The proposed definition also acts to include employers, third-party payroll processors operating or managing payroll card accounts as "financial institutions" under Regulation E. Making these parties subject to

Regulation E would appear to result in double coverage of the cards under Regulation E and potentially double liability. We believe it is more appropriate to exclude the employers from the definition, and allow the banks to allocate responsibilities by contract.

BB&T believes that, as noted above, a payroll card should be treated more like a government benefit card and, accordingly, the definition of the payroll card account should more closely resemble the definition of an account under 12 C.F.R. 205.15(a)(2). Specifically, we suggest that a payroll card account should be defined as “an account established directly or indirectly by an employer, merchant, or financial institution for distributing on a recurring basis wages, salary, or employee compensation to a consumer electronically, such as through automated teller machines or point of sale terminals.”

C. Mailed periodic statements should not be required for payroll cards.

The principal requirement of Regulation E that we believe should not be applied to payroll cards is the requirement to deliver periodic statements, or the requirement to include certain content-specific information in periodic statements if they are required. Instead, we believe that entities offering payroll cards should be subject to rules similar to those contained in section 205.15 of Regulation E for administering government-issued or government-sponsored electronic benefit cards. In this regard, section 205.15 exempts government agencies from the periodic statement-related requirements, provided the agencies make balance information available to consumers.

BB&T’s view that the periodic statement requirement is inappropriate for payroll cards is based on our belief that a paper statement mailed to the payroll cardholder on a monthly basis is not the most effective method of providing information to this customer segment. This conclusion is based on the following observations:

(i) Payroll cards often are held by individuals commonly referred to as the “unbanked.” This unbanked community includes transient employees that are less likely to have a stable address at which they are able to receive mail and periodic statements. The mobility of this community makes the mailing of periodic statements a less reliable means of conveying information to the payroll cardholder than for the deposit account holder. A number of payroll card issuers have reported receiving a significantly higher than normal rate of statements returned as undeliverable, with one financial institution experiencing up to 75% of its payroll card statements being returned as undeliverable.

(ii) The primary information that is of concern to most payroll cardholders is the current balance remaining on the card. The preferred method for accessing this information is via ATM’s, automated telephone inquiry

systems, and the internet. This real time information is not required to be provided to accountholders under Regulation E, although it is made available by most payroll card issuers. As implied by the term “unbanked”, this group is often not familiar with the process of keeping a record of withdrawals and other transactions and balancing a bank statement. A paper statement delivered by mail each month may take a number of days to reach the cardholder and will reflect a balance that may no longer be current, possibly misleading the cardholder as to the amount of funds available.

(iii) The experience of payroll card issuers has been that initially, new recipients of payroll cards usually draw the balance on the card down to zero almost immediately by using an ATM to convert the balance on the card into cash. As recipients become more comfortable with the card, the cardholder may carry a balance on the card for longer periods. Those cardholders that carry balances then are actively marketed by the issuer to open a deposit account and use other banking services. This is consistent with BB&T’s view that payroll cards are a transition payment product that assists in bringing the “unbanked” into the banking system, rather than the equivalent of a deposit account.

(iv) Finally, the financial models for electronic payment cards, including, payroll cards, dictate that financial institutions have the ability to offer these products in the most cost effective manner. To the extent that financial institutions are required to use ineffective means to communicate with these cardholders, the extra costs will be passed on to the consumer or business. In addition, it will reduce the issuers’ ability to provide free access by the other more effective means noted above and inhibit the ability to serve the very population in need of these products and services.

For these reasons, we believe that payroll cards should not be subject to the periodic statement requirements in Regulation E that apply to traditional deposit accounts. Instead, we believe that it is more appropriate to apply alternative balance availability requirements to payroll cards, similar to the requirements for electronic benefit cards. Flexible balance information requirements would be more appropriate for the unique structure and design of payroll cards and the characteristics and needs of payroll cardholders. Options such as providing balance and transaction information at ATMs, through automated telephone inquiry systems, and through the internet, would make card information available on a real-time basis, 24 hours a day, and be a far more effective and convenient information delivery channel for both cardholders and card issuers.

D. Other comments related to payroll cards.

1. The proposed transition period for compliance should be one year. The Proposed Rule asks for comment on whether a six month transition period would be sufficient to comply with any new Regulation E requirements that may be imposed on payroll cards. We believe that a six month transition following adoption of any revised rules is not sufficient time for mandatory compliance. We recommend a mandatory compliance date of at least one year following adoption. This time period would allow most institutions to prepare the necessary disclosures and mail them to cardholders in conjunction with normally scheduled regulatory mailings. It would also allow sufficient time for modifying card processing systems to meet requirements for periodic statements or any alternatives provided in the final rules.

2. Payroll card coverage under Regulation E should not affect or be affected by other regulatory requirements. The Proposed Rule also asked for comment on whether Regulation E coverage should be determined by whether the FDIC considers the funds underlying payroll cards “insured deposits” under the Federal Deposit Insurance Act. We believe that these issues should be determined separately. There are various regulations and laws that may be implicated by the issuance of payroll cards, including that of deposit insurance coverage, reserve requirements, and the “know your customer” rules of the USA Patriot Act. We believe that the applicability of each of these laws to payroll and other electronic payment card products should be determined on the basis of separate reasoned policy decisions reached after considering the facts and circumstances surrounding each type of product, rather than relying on the determinations of other regulators based on different considerations.

II. ELECTRONIC CHECK CONVERSION

A. Regulation E should apply to merchants engaging in ECK transactions for the limited purpose of obtaining consumer authorizations.

The existing Commentary addresses the application of Regulation E to ECK transactions. The Proposed Rule would revise 205.3(b)(2) to include the guidance that is currently contained in the Commentary in Regulation E with some revisions. The Proposed Rule would subject all parties, including merchants, engaging in ECK transactions to Regulation E coverage for the limited purpose of obtaining consumer authorizations for ECK transactions. We believe that it is appropriate to extend Regulation E coverage to merchants engaging in ECK transactions to Regulation E coverage for the limited purpose of obtaining consumer authorizations for ECK transactions.

We agree with the FRB’s statement that EFT’s initiated using information from a convenience check tied to a credit line or money order are not covered by

Regulation E because there is no transfer of funds from a consumer account. Such guidance is helpful to financial institutions and we request that this guidance be added to the revised Commentary.

B. Consumer authorization should be obtained for ECK transactions.

In general, BB&T supports the sections of the Proposed Rule requiring the consumer's authorization for ECK transactions. The Proposed Rule provides needed flexibility in that it would permit the parties to provide notice via a variety of methods such as a sign or written statement at the point of sale, or a statement on a billing statement or invoice. The revised Commentary would provide that the consumer is deemed to have authorized the ECK if notice is provided and the consumer goes forward with the transaction. BB&T believes that it is appropriate that all parties to an ECK transaction, including merchants and other payees, obtain the consumer's authorization for the transaction. We also support the proposal that the consumer is deemed to have authorized the electronic debit to collect the fee if the consumer proceeds with the transaction after receiving this notice. Finally, we believe it is appropriate for financial institutions to list ECK transactions among the types of electronic fund transfers available in initial disclosures.

The FRB requested comment on whether merchants or other payees should be required to obtain the consumer's written signed authorization to convert checks received at the point of sale. We believe that written signed authorization should not be made a requirement of Regulation E. This is a matter best addressed in the operating rules of the various payment processing networks, such as NACHA, which currently requires the consumers' written authorization.

C. New notice requirements should not be imposed.

The Proposed Rule would impose a new notice requirement for persons engaging in ECK transactions, specifically a notice stating that when a check is used to initiate an EFT, the funds may be debited from the consumer's account "quickly". We oppose any requirement that notices state that funds will be debited quickly. We believe that stating that funds will be debited "quickly" does not provide meaningful information to the consumer as it is impossible to explain what "quickly" means in different circumstances. In addition, the language would be misleading and inaccurate in many instances, given the many situations today, and particularly with the advent of Check 21, in which paper checks may clear as quickly, or even more quickly, than an ECK transaction.

The FRB requests comment on whether notices that state that a check used to initiate an EFT **may** be processed as a paper transaction should also specify the circumstances in which the check would be processed as a paper transaction.

BB&T believes that Regulation E should not require that notices state the circumstances in which the check would be processed as a paper transaction. We believe that merchants, payees and banks should be able to use their discretion in processing checks in the most efficient manner, and that there are numerous and frequently changing factors that can influence their decisions. It is our opinion that disclosing all of these potential circumstances would provide no material benefit to consumers.

III. Other Proposed Commentary Revisions.

The Proposed Rule also provides proposed revisions to the Commentary relating to a variety of issues, including issuance of additional access devices, ATM disclosures, telephonic authorization for preauthorized and recurring transfers, and error resolution requirements. BB&T is in favor of all of the proposed revisions to the Commentary except for the proposed addition of the comment that would expand a financial institution's error resolution and investigation responsibilities to include review of any information available within the institution that could be used to determine whether an error has occurred. We feel this requirement is too broad and open-ended, and would place an undue burden to search all possible relevant information within the financial institution's records. We encourage the FRB to limit the investigation to the particular account affected and to provide financial institutions with flexibility in conducting reasonable investigations of unauthorized transactions and billing errors.

Thank you for the opportunity to provide these comments on the Proposed Rule and Commentary. We look forward to further discussions with the FRB staff on these important matters. In the meantime, if you have any questions, please do not hesitate to contact me.

Sincerely,

Marshall E. Tyner, Jr. (Woody)
Senior Vice President
Payment Systems Strategist